

**MEMORANDUM OF AGREEMENT BETWEEN THE
ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY
AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION IX**

I. GENERAL

A. Purpose

This Memorandum of Agreement between the Arizona Department of Environmental Quality and Region IX of the United States Environmental Protection Agency sets out the Parties' responsibilities for administering the permit program established under Section 404 of the Clean Water Act, as required under 40 C.F.R. § 233.13. The Parties agree that this Agreement does not address permits or portions of permits issued by ADEQ which do not apply to discharges other than discharges of dredged or fill material, or for permits or portions of permits issued by ADEQ for discharges into waters other than State Assumed Waters.

B. Definitions

For purposes of this Agreement, the following definitions apply:

- (1) "Agreement" means this Memorandum of Agreement between ADEQ and EPA.
- (2) "ADEQ" means the Arizona Department of Environmental Quality.
- (3) "A.R.S." means the Arizona Revised Statutes.
- (4) "C.F.R." means Code of Federal Regulations.
- (5) "Corps" means the Secretary of the Army, acting through the Chief of Engineers.
- (6) "CWA" means the Federal Water Pollution Control Act, as amended, otherwise known as the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, and underlying regulations.
- (7) "Director" means the Director of ADEQ.
- (8) "EPA" means Region IX of the United States Environmental Protection Agency.
- (9) "Mexico" means the United Mexican States.

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(10) "NMFS" means the National Marine Fisheries Service.

(11) "Parties" means ADEQ and EPA.

(12) "Permit" means an instrument issued by the Director or the Corps that authorizes a discharge of dredge or fill material within State Assumed Waters, consistent with the requirements of 40 C.F.R. Part 233, Subpart C. The definition of Permit does not include a subsequent authorization to discharge under a General Permit.

(13) "Section 404" means CWA Section 404, 33 U.S.C. § 1344, and underlying regulations.

(14) "USFWS" means the United States Fish and Wildlife Service.

(15) "U.S.C." means the United States Code.

(16) "State" means any of the 50 States, the District of Columbia, Guam, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, the Trust Territory of the Pacific Islands, or an Indian Tribe recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.

(17) "State Assumed Waters" means Waters of the United States within the State of Arizona's jurisdiction of governance except those waters over which the Corps retains jurisdiction.

(18) "State 404 Program" means the permit program for discharges of dredged or fill material, established under CWA Section 404(g) into State Assumed Waters.

C. Effective Date and Revisions

(1) ADEQ and EPA shall execute this Agreement which shall take effect at the time that EPA approves the State 404 Program, as required under 40 C.F.R. § 233.13(a).

(2) Either party may request a revision to this Agreement. Revisions to this Agreement shall be in writing and shall be effective upon completion of the procedures outlined in 40 C.F.R. § 233.16, where required, and Section IV.C of this Agreement.

(3) Revisions to this Agreement shall be signed by both Parties.

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49 (4) This Agreement shall remain in effect until EPA withdraws program approval
50 pursuant to 40 C.F.R. § 233.53(b), or ADEQ voluntarily transfers State 404 program responsibilities under
51 40 C.F.R. § 233.53(a).

52 D. State 404 Program Approval and Assumption

53 (1) After receiving EPA approval, ADEQ shall take all necessary steps to implement the
54 State 404 Program.

55 (2) Upon implementation of the State 404 Program, ADEQ shall inform EPA that it
56 intends to notify the Corps that it is administering the program, as contemplated by Section 404(h)(5), and
57 the date when the notice will be made.

58 (3) Concurrent with ADEQ's notice to the Corps under Section I.D(2), EPA shall publish
59 notice of program approval in the Federal Register.

60 E. Cooperation Between the Parties

61 (1) The Parties agree to maintain a high level of cooperation and coordination between
62 ADEQ and EPA staff in a partnership to assure successful and effective administration of the State 404
63 Program. EPA shall provide ADEQ with technical and other assistance as requested. The Parties shall adhere
64 to all requirements of Section 404 and underlying regulations. ADEQ shall administer the State 404 Program
65 consistent with Federal and Arizona law.

66 (2) Any correspondence relating to the execution, performance, or revision of this
67 Agreement shall be sent to:

68 **For ADEQ:**

EPA:

69 [CONTACT INFORMATION]

[CONTACT INFORMATION]

70 (3) To comply with A.R.S. § 41-4401(A), each party hereby warrants its compliance
71 with all federal immigration laws and regulations that relate to its employees and A.R.S. § 23-214(A). If
72 either party uses any subcontractors in performance of this Agreement, subcontractors shall warrant their

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73 compliance with all federal immigration laws and regulations that relate to its employees and A.R.S. § 23-
74 214(A). Each party retains the legal right to inspect the papers of any contractor or subcontractor employee
75 who works on the Agreement to ensure that the contractor or subcontractor is complying with this
76 warranty.

77 (4) Subject to statutory confidentiality requirements Arizona law and this Agreement,
78 EPA and ADEQ shall have equal access to data and information prepared under this Agreement on a no-
79 charge basis.

80 (5) ADEQ shall only be required to provide records, reports, files, and other information
81 that is relevant to the enforcement and administration of the State 404 Program.

82 F. Confidentiality of Information

83 (1) The Parties shall not be required to disclose information when disclosure is prohibited
84 by law or protected by privilege.

85 (2) All of the information EPA transfers to ADEQ will be provided subject to the
86 confidentiality procedures and limitations of 40 C.F.R. § 233.3.

87 (3) Any information submitted to EPA by ADEQ may be claimed as confidential by
88 ADEQ at the time of submission, and EPA shall make final determination as to that claim in accordance with
89 the procedures of 40 C.F.R. part 2 and 40 C.F.R. 233.3.

90 (4) Notwithstanding Section I.F(3), EPA shall not disclosed to the public the following
91 information when obtained from ADEQ:

- 92 a. Income tax returns.
- 93 b. Social Security numbers.
- 94 c. Bank account numbers.
- 95 d. Birth dates.

- 96 e. Home addresses, but not including the address of a permit applicant or
97 permittee.
- 98 f. Drinking water system security vulnerability assessments.
- 99 g. Information designated as trade secrets by ADEQ.
- 100 h. Information when determined by the Arizona Attorney General's Office that
101 disclosure of the information or a particular part of the information would be detrimental to an ongoing
102 criminal investigation or to an ongoing or contemplated civil enforcement action under A.R.S. Title 49,
103 Chapter 2, in Arizona superior court.
- 104 i. Financial information submitted by an applicant for a qualified business
105 settlement and marked confidential.
- 106 j. Environmental Audit Reports disclosed to ADEQ under the terms of a
107 confidentiality agreement as set forth under A.R.S. § 49-1404.
- 108 k. All critical infrastructure and key resource information that is protected by the
109 critical infrastructure information act of 2002, 16 U.S.C. § 133, and Arizona law, A.R.S. § 41-1803.

110 G. Computing Time Periods

111 In computing any period of time prescribed by this Agreement, the day on which the designated
112 period of time begins shall not be included. Saturdays, Sundays, and state and federal holidays shall be
113 included. When a stated time expires on a Saturday, Sunday, or legal holiday, the stated time period shall be
114 extended to include the next business day.

115 H. Agreement with the Corps

116 ADEQ shall enter into a Memorandum of Agreement with the Corps as required under 40
117 C.F.R. § 233.14.

118 I. Agreements with Other Agencies

119 In administering the State 404 Program, ADEQ may enter into agreements with other agencies,
120 including, but not limited to, the United States Fish and Wildlife Service and Arizona Game and Fish.

121 J. Conflict Resolution Procedures

122 Issues that may arise between the Parties under this Agreement shall be elevated and resolved as
123 quickly as practicable. The following best practices should be followed.

124 (1) Issues should be resolved whenever possible at the EPA and ADEQ career
125 management level.

126 (2) If career management cannot resolve an issue, the matter should be elevated within
127 thirty (30) days for resolution by the EPA Regional Administrator and ADEQ senior management.

128 (3) If, following elevation within the EPA region and ADEQ senior management, there
129 remains a dispute between the EPA Regional Administrator and ADEQ, the matter should be elevated within
130 sixty (60) days to the EPA Assistant Administrator for the Office of Enforcement and Compliance Assurance
131 for a decision. The EPA Regional Administrator and ADEQ will be afforded the opportunity to present the
132 matter in dispute to the Assistant Administrator prior to a final decision.

133 II. PERMIT APPLICATION REVIEW AND PERMIT ISSUANCE

134 A. Lead Agency Responsibility for State 404 Program

135 (1) ADEQ will be the lead agency in Arizona for administering the State 404 Program.
136 ADEQ shall administer the State 404 Program as required under Section 404 and underlying regulations.
137 ADEQ shall be entitled to set strategies and priorities for permit review, compliance monitoring, and
138 enforcement of the State 404 Program.

139 (2) EPA retains its authority to initiate independent or parallel enforcement actions in
140 accordance with Sections 309 and 404(n) of the CWA.

141 (3) ADEQ may delegate the State 404 Program, either partially or entirely, to another
142 Arizona state agency or agencies. ADEQ shall maintain oversight of the State 404 Program and will retain

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143 the ability to revise or rescind permits issued by delegated entities. If ADEQ proposes to delegate all or part
144 of the State 404 Program, such delegation is not effective until the Regional Administrator approves the
145 delegation under 40 C.F.R. § 233.16(d), and the State 404 Program and this Agreement are revised under
146 Sections I.C and IV.C.

147 B. Waiver of Review

148 (1) Pursuant to Section 404(k) of the CWA and 40 C.F.R. § 233.51, EPA waives the
149 requirements of Section 404(j) and the regulations adopted thereunder regarding federal review of ADEQ
150 permit applications for all but the following categories of permits:

- 151 a. Draft general permits;
- 152 b. Discharges with reasonable potential for affecting endangered or threatened
153 species as determined by USFWS;
- 154 c. Discharges with reasonable potential for adverse impacts on waters of another
155 State;
- 156 d. Discharges known or suspected to contain toxic pollutants in toxic amounts
157 (Section 101(a)(3) of the CWA) or hazardous substances in reportable quantities (Section 311 of the CWA);
- 158 e. Discharges located in proximity of a public water supply intake;
- 159 f. Discharges within critical areas established under Arizona state or federal law,
160 including but not limited to national and state parks; fish and wildlife sanctuaries or refuges; national and
161 historical monuments; wilderness areas and preserves; sites identified or proposed under the National
162 Historic Preservation Act; and components of the National Wild and Scenic Rivers System;
- 163 g. Discharges within sites that are owned or managed by federal entities, and
164 activities by an applicant that is a federal entity or a non-federal entity conducting activities pursuant to
165 federal contract or grant.

166 (2) EPA may terminate waiver of the review of categories through the procedures outlined
167 in 40 C.F.R. § 233.51.

168 (3) ADEQ may, at ADEQ's sole discretion, request EPA review of specific permit
169 applications.

170 C. Coordination with Other States

171 (1) Whenever ADEQ receives an application for a permit where the proposed discharge
172 could affect the biological, chemical, or physical integrity of the waters of any State other than the State of
173 Arizona, or the waters of Mexico, ADEQ shall provide an opportunity for such State(s) or Mexico to submit
174 written comments within the public comment period and to suggest permit conditions. ADEQ shall provide
175 at least 30 days to submit comment.

176 (2) If ADEQ does not accept the recommendations of another State or Mexico, ADEQ
177 shall notify the affected State or Mexico and the EPA in writing of its failure to accept the recommendations,
178 together with ADEQ's reasons for so doing. The EPA may then comment upon, object to, or make
179 recommendations as provided in 40 C.F.R. 233.50(d) and Section II.D.

180 D. Permit Processing and Federal Comment

181 ---UNDER DEVELOPMENT---

182 E. Coordination Concerning Discharges with Reasonable Potential for Affecting Endangered or
183 Threatened Species

184 ---UNDER DEVELOPMENT---

185 F. Coordination of Mitigation Banking and In-Lieu Fee Programs

186 --- UNDER DEVELOPMENT ---

187 III. COMPLIANCE MONITORING AND ENFORCEMENT

188 A. Nothing in this Agreement shall be construed to restrict in any way EPA's authority to fulfill
189 its oversight and enforcement responsibilities under the CWA, nor shall it restrict ADEQ's enforcement
190 responsibilities under Arizona law.

191 B. EPA will retain responsibility for any pending enforcement actions undertaken by EPA prior
192 to the date of EPA's approval of the State 404 Program. ADEQ shall have primary responsibility for
193 compliance monitoring and enforcement of the State 404 Program after EPA approves the State 404 Program.
194 ADEQ will take timely and appropriate enforcement action against persons in violation of permit conditions
195 of permits issued pursuant to the State 404 Program and against persons responsible for unauthorized
196 discharges of dredged or fill material into State Assumed Waters. This paragraph shall not be construed to
197 limit ADEQ's ability to set strategies and priorities for permit review, compliance monitoring, and
198 enforcement of the State 404 Program.

199 C. ADEQ shall notify EPA of the status of compliance and enforcement actions through
200 submission of the State 404 Program Annual Report described in Section IV.B of this Agreement.

201 D. ADEQ may refer information regarding possible or alleged violations to EPA and may request
202 that EPA consider initiating a parallel or independent enforcement action.

203 E. EPA may initiate independent or parallel enforcement action in accordance with Sections 309
204 and 404(n) of the CWA.

205 F. ADEQ shall provide for public participation in the State 404 Program enforcement process
206 pursuant to 40 C.F.R. § 233.41(e).

207 G. Prior to proceeding with a federal enforcement action against a possible or alleged State 404
208 Program permit violation or unauthorized discharge, and for purposes of providing notice only, EPA shall
209 inform ADEQ that federal enforcement action is to be initiated. This notification shall be made to the Director
210 of ADEQ or his/her designee. EPA shall make reasonable efforts to provide for staff discussions between
211 EPA and ADEQ representatives before initiation of federal enforcement action.

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212 IV. PROGRAM MAINTENANCE

213 A. Program Review and Oversight

214 (1) EPA may evaluate the State 404 Program in accordance with Section 404 and 40 C.F.R. Part
215 233, Subpart F.

216 (2) EPA may request to review State records, reports and files relevant to the administration and
217 enforcement of the approved program, as determined by the Parties. Such requests shall be for the purposes
218 of allowing EPA to evaluate the State 404 Program as a whole, and not as a means for EPA to object to
219 individual ADEQ actions.

220 B. Annual Report

221 (1) The annual period for the State 404 Program Reports shall be the State fiscal year
222 ending June 30th.

223 (2) Within 90 days after completion of the annual period, ADEQ shall submit to EPA a
224 Draft State 404 Program Report evaluating ADEQ's administration of the State 404 Program, and identifying
225 problems the State has encountered in the administration of its program and recommendations for resolving
226 these problems. Items that shall be addressed in the annual report include:

227 a. An assessment of the cumulative impacts of the State's permit program on the
228 integrity of the State regulated waters;

229 b. Identification of areas of particular concern and/or interest within the State;

230 c. The number and nature of individual and general permits issued, modified, and
231 denied;

232 d. The number of violations identified and number and nature of enforcement
233 actions taken;

234 e. The number of suspected unauthorized activities reported and nature of action
235 taken;

f. An estimate of the extent of activities regulated by general permits; and

g. The number of permit applications received but not yet processed.

(3) ADEQ shall make the Draft State 404 Program Annual Report available for public inspection concurrently with submission to EPA.

(4) Within sixty (60) days of receipt of the Draft State 404 Annual Report, EPA will complete review of the draft report and transmit comments, questions, and/or requests for additional evaluation and/or information to ADEQ.

(5) Within thirty (30) days of receipt of EPA's comments, ADEQ will finalize the State 404 Program Annual Report, incorporating and/or responding to the EPA's comments, and transmit the final report to EPA.

(6) Upon acceptance of the State 404 Program Annual Report, EPA shall publish notice of availability of the final report.

C. State 404 Program Revisions

(1) Revisions of the State 404 Program shall follow the procedure outlined in 40 C.F.R. 233.16.

(2) ADEQ shall keep EPA fully informed, to the extent allowed by law, of any proposed or actual changes to the State's statutory or regulatory authority or any other modifications which are significant to administration of the program.

(3) EPA shall keep ADEQ fully informed, to the extent allowed by law, concerning draft, proposed, and final versions of EPA regulations, technical guidance, policy and procedure which pertain to implementation of the State 404 Program.

(4) Any approved program which requires revision because of a modification an applicable Federal statute or regulation shall be revised within one year of the date of promulgation of such

259 regulation, except that if an Arizona state statute must be amended or enacted in order to make the required
260 revision, the revision shall take place within two years.

261 (5) Whenever EPA has reason to believe that circumstances have changed with respect to
262 the State 404 Program, EPA may request, and ADEQ shall provide, a supplemental Attorney General's
263 statement, program description, or other documents or information necessary to evaluate the State 404
264 Program's compliance with the requirements of the CWA and regulations at 40 C.F.R. Part 233.

265 (6) If ADEQ determines that it will no longer administer the State 404 Program, ADEQ
266 shall provide notice to EPA and the Corps not less than 180 days prior to cessation of program operation, and
267 shall arrange for transfer of all program materials to the Corps as required under 40 C.F.R. § 233.53(a).

268 (7) Any program modifications that necessitate modifications to this Agreement shall not
269 be effective until the modified agreement is signed by ADEQ and EPA, and EPA gives notice of approval of
270 program modifications as outlined in 40 C.F.R. § 233.16.

271 V. INTENT, EFFECT, AND INTERPRETATION OF THIS AGREEMENT

272 A. The Parties enter into this Agreement based solely on the representations and warranties
273 herein and not based on any promises, representations, and/or warranties not found herein. This Agreement
274 contains the entire agreement of the parties with respect to the subject matters hereof, and it may be
275 amended, modified, or waived only according to the terms of this Agreement.

276 B. This Agreement does not create any right or benefit, substantive or procedural, enforceable
277 by law or equity, by any persons, their officers or employees, or any other person. This Agreement does not
278 apply to any person outside of ADEQ and EPA.

279 C. The signatory agencies do not waive any administrative claims, positions, or interpretations
280 they may have with respect to the applicability or enforceability of the CWA, the ESA, or any other federal
281 or state law or regulation.

282 D. Nothing in this Agreement shall be interpreted as obligating the Parties for the expenditure of
283 funds in excess of appropriations authorized by law, or otherwise commit the signatory agencies to actions
284 for which they lack statutory authority.

285 E. Nothing in this Agreement authorizes the taking of federally listed threatened or endangered
286 species.

287 F. The headings in this Agreement are for convenience of reference only and shall not limit or
288 otherwise affect the meaning thereof.

289 G. If any provision of this Agreement is held to be illegal or invalid by a court of competent
290 jurisdiction, such provision shall be deemed to be severed and deleted; and neither such provision, nor its
291 severance and deletion, shall affect the validity of the remaining provisions.

292 H. Pursuant to A.R.S. §35-154(A), every payment obligation of ADEQ under this Agreement is
293 conditioned upon the availability of funds appropriated or allocated for the payment of such obligation. If
294 funds are not allocated and available for the continuance of this Agreement, this Agreement may be
295 terminated pursuant to the terms of this Agreement and the Clean Water Act and underlying regulations. No
296 liability shall accrue to either party in the event this provision is exercised, and the parties shall not be
297 obligated or liable for any future payments or for any damages as a result of termination under this paragraph.

298 I. The waiver or failure to enforce any provision of this Agreement will not operate as a waiver
299 of any future breach of any such provision or any other provision hereof.

300 VI. SIGNATURES

301 **Arizona Department of Environmental Quality**

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303 Date: _____

By: _____

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305 **United States Environmental Protection Agency Region IX**

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307 Date: _____

By: _____

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